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The Impact Of the New Penal Code On First Amendment Freedoms



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Unquestionably, a state can outlaw conduct that is potentially violent in nature. Similarly, no one questions a state's right to outlaw conduct that is inherently offensive to the sensibilities, e.g., loud noise from defective mufflers. Furthermore, a state has the unquestioned right to outlaw conduct that inconveniences the public, e.g., parking regulations. However, a person communicating an idea will often do so through the medium of: (1) conduct conducive to violence, (2) conduct inherently offensive to the sensibilities, (3) conduct that inconveniences the public. Communicating ideas falls within the protections of the First Amendment of the United States Constitution;¹ therefore a state cannot outlaw the three types of conduct listed above if doing so impinges upon First Amendment rights to freedom of expression and assembly.

In addition to the First Amendment hurdle, statutes regulating the three types of conduct mentioned above often run afoul of the rules against overbreadth and vagueness.

The rule against vagueness requires that the regulation be drawn with sufficient specificity so that persons seeking to exercise First Amendment rights as well as those attempting to enforce the regula-

tion, will know definitely what is being prohibited. The rule against overbreadth demands that the regulation be framed to cover only that conduct which is constitutionally subject to control, and not embrace conduct protected under the First Amendment or conduct that might not be protected but it is not necessary to control in order to achieve the desired objective. Failure to meet either of these requirements means that the regulation is void on its face. . . .²

No legislative draftsman can list—or even precisely characterize—all conceivable manifestations of the three types of conduct mentioned above. The inevitably vague attempts to define such conduct in a statute jeopardize freedom of expression and assembly, because the vagueness in the statutes provides law enforcement officers with too much leeway to characterize legitimate but offensive conduct as criminal conduct.³ Ultimately, the validity of such statutes must be tested in the balance between the desirability of controlling annoying conduct and the undesirability of penalizing expression.

Texas' new Penal Code contains several statutes reg-

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ulating conduct that can be classified as: (1) conduct conducive to violence, (2) conduct inherently offensive to the sensibilities, (3) conduct that inconveniences the public. This brief article examines those statutes against the backdrop of the First Amendment and the doctrines of vagueness and overbreadth. No effort is made here to fully explicate the law of the First Amendment or the law of the doctrines of vagueness or overbreadth; instead, the effort is to offer a primer of that law and to apply it—in a brief and summary

manner—to specific statutes selected from the new Penal Code. Hopefully, some useful questions are raised, and some answers suggested, for those lawyers who are called upon to apply the statutes.

Conduct Conducive to Violence

Somewhat arbitrarily, three sections from the new Penal Code have been selected for discussion under this heading. The sections to be discussed are 22.07, Terroristic Threat; 42.01, Disorderly Conduct; and 42.02, Riot.

Section 22.07, Terroristic Threat, criminalizes the act of threatening to commit a violent offense provided the threat is made with intent to cause a reaction from an agency (police, fire, etc.) or the threat is made with intent to place a person in fear or the threat is made with intent to interrupt the occupation of some premises. Since Section 22.07 regulates speech, it must be interpreted with the First Amendment in mind. "The Constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within 'narrowly limited classes of speech.' . . . In other words, the statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression."⁴ The question thus becomes whether Section 22.07 punishes protected speech.

The Supreme Court has held that a true threat is not constitutionally protected speech.⁵ What constitutes a true threat is not specified in Section 22.07, nor elsewhere in the Penal Code, but the United States Court of Appeals for the Fifth Circuit has held that a true threat is a serious threat; not words uttered as a mere political argument, idle talk, or jest, and that the full context in which the words were spoken should be considered.⁶ The Texas Court of Criminal Appeals has held that the threat "must be seriously made and not merely the outburst of one's temper in the heat of passion, it must be expression of a conclusion deliberately made."⁷ Seemingly, therefore, we can safely speculate that Section 22.07 passes constitutional muster because it regulates only true threats, i.e., remarks intended to place a person in fear. It could be argued that the lack of a specific definition of a true threat makes the statute vague. However, impossible standards of specificity are not required by the law, and the statute is limited to threats to commit some criminal offense.

As a footnote to the discussion of Terroristic Threat, brief reference must be made to Section 36.03, Coercion of Public Servant or Voter. This offense is substantially the same as Terroristic Threat, but it is limited to threats made to voters or public servants performing official duties. This statute seems justified in view of the interest at stake—i.e., the integrity of the governmental process.⁸

As one might anticipate, Section 42.01, Disorderly Conduct, is more suspect than the Terroristic Threats statute. Sections 42.01(a)(1), (2), (4) make it a criminal offense to intentionally or knowingly use language which "tends" to incite an immediate breach of the peace; or to make a gesture which "tends" to incite an immediate breach of the peace; or to engage in conduct "which abuses or threatens a person . . . in

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Tex. Penal Code §42.03 (Punch 8-5-42-03)

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Tex. Penal Code §42.07 (Punch 8-5-42-07)

Tex. Penal Code §42.09 (Punch 8-5-42-09)

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Synopsis

1. 38 TBJ 245 (March '75). Article by Walter Steele, on First Amendment problems of the Texas Penal Code.

2. This article examines probable constitutional infringements by certain sections of the Penal Code.

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an obviously offensive manner." Of course, such conduct can be an act of communication, and consequently the risk of violating the First Amendment is very real. In *Chaplinsky v. New Hampshire*, the United States Supreme Court confirmed the power of a state to pass "a statute punishing verbal acts, carefully drawn so as not unduly to impair liberty of expression. . . ."⁹ So, in order to avoid violating the First Amendment, the draftsman of a disorderly conduct statute must carefully limit the verbal (or gesture) conduct being regulated "so as not unduly to impair liberty of expression." Liberty of expression is not unduly impaired if "fighting words" are all that is prohibited. "Fighting words" are "words which might at their very utterance inflict injury or tend to incite an immediate breach of the peace."¹⁰ The Texas Legislature adopted that definition of "fighting words" almost verbatim in the Disorderly Conduct statute. Nevertheless, the Texas statute can be expected to fall unless the courts narrowly limit its application to facts where the words spoken have a direct tendency to cause the person to whom the words are addressed to react violently.¹¹

Section 42.02, Riot, is the final section of the Texas Penal Code to be considered under the heading of Conduct Conducive to Violence. As defined, a "riot" occurs whenever seven or more persons gather together and create an immediate danger to property or persons, or substantially obstruct law enforcement, or disturb a person's enjoyment of a legal right.

Both the Riot statute and the Disorderly Conduct statute raise the issue of the extent to which a hostile audience will be allowed to interfere with a speaker's freedom of expression.¹² We know that a state can outlaw "fighting words," but the First Amendment guarantees the right to express unpopular ideas.¹³ A speaker cannot be jailed simply because he is expressing a viewpoint so contrary to that of the audience that violence may erupt.¹⁴

The line between legally expressing unpopular ideas and fighting words" can be hard to locate. *Terminiello v. Chicago*,¹⁵ is an excellent example of the problem. In the *Terminiello* case an anti-semitic speaker made a speech in an auditorium before approximately 1,000 people, mostly friendly to his viewpoint. Outside the auditorium was a crowd antagonistic to the speaker which also numbered approximately 1,000. During the course of the speech the crowd outside tried to break down the doors to the auditorium, windows were

broken and some people were injured. While the ruckus was taking place, the speaker referred to the people outside the auditorium as "scum," whereupon he was arrested and convicted of disturbing the peace. At the trial the court charged the jury that the defendant would be guilty if he uttered words of the kind that "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance. . . ." The Supreme Court of the United States overturned the conviction because the kind of speech described in the Court's charge was protected by the First Amendment.

Seemingly, the conduct of *Terminiello* would violate the Texas Disorderly Conduct statute or the Riot statute, and therein lies the problem. These two statutes are safe from constitutional attack only if the courts read into them the concept that a speaker may legally express unpopular ideas, although he cannot legally provoke a listener to fight. Without that limiting interpretation, the Disorderly Conduct statutes and the Riot statute violate the rights protected by the First Amendment.

Conduct Inherently Offensive to the Sensibilities

Five sections of the Penal Code will be discussed under this heading: they are Sections 43.22 and 43.23, Obscene Display and Commercial Obscenity; and Section 42.01, Disorderly Conduct; Section 42.07, Harassment; and Section 42.09, Desecration of Venerated Object.

No one doubts the power of a state to outlaw obscenity.¹⁶ Defining obscenity is the problem. After obscenity is properly defined, the state must decide what usages of obscenity it will or will not allow. Recently, guidelines for determining what constitutes obscenity were set out by the United States Supreme Court in *Miller v. California*.¹⁷ The *Miller* guidelines are:

1. Regulation of obscene matters is confined to works which depict or describe sexual conduct; conduct must be specifically defined by the applicable state law.
2. The work, taken as a whole, must appeal to the prurient interest in sex.
3. The work must portray sexual conduct in a patently offensive way.
4. The work, taken as a whole, must lack serious literary, artistic, political, or scientific value.

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The purpose of the first *Miller* test is to provide fair notice of what activities will bring prosecution.¹⁸ The Supreme Court gave examples of how the prohibited activities could be listed:¹⁹

1. Patently offensive representation of descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
2. Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

The definition of obscenity in the Texas statute is as follows:

- (1) "Obscene" means having as a whole a dominant theme that:
 - (A) Appeals to the prurient interest in sex, nudity, or excretion;
 - (B) Is patently offensive because it affronts contemporary community standards relating to the description or representation of sex, nudity, or excretion; and
 - (C) Is utterly without redeeming social value.²⁰

The Texas list of prohibited activities barely approaches the specificity set forth in the *Miller* examples. The concurring opinion by Justice Brennan in the recent case of *Jenkins v. Georgia*²¹ is even more damning for the Texas list of activities. Justice Brennan, joined by Justices Stewart and Marshall, believed the Georgia statute—defining obscenity as prurient interest in "nudity, sex, or excretion"—to be unconstitutionally overbroad and therefore facially invalid. Hence it would seem that "sex, nudity, or excretion" stated in the Texas statute does not measure up to the detail required by *Miller* for listing prohibited activities. However, in the recent case of *West v. State*²² the Texas Court of Criminal Appeals approved the list in the Texas statute. The Texas court reasoned that the Texas list includes *all* forms of sexual conduct. Therefore, the list includes all of the examples of activities suggested in *Miller*. As stated by the Texas court in *West*:

It is clear the Legislature intended to include *all* descriptions or representations of prurient, patently offensive sexual conduct utterly without redeeming social value, and to this end included all such descriptions and representations of *all* sexual matters. . . . It would, therefore, certainly include such examples as those suggested in *Miller*. . . .²³

The Court of Criminal Appeals also gave its own list of what constitutes sexual matters:

"Sexual matters" clearly would also include courtship, kissing, "petting," sexual caressing, sexual fondling, rape, prostitution, birth, nursing, birth control and abortion. Obviously not all descriptions or representations of such matters are obscene. Only such descriptions or representations as are patently offensive because they affront contemporary community standards relating thereto and which have a dominant theme which taken as a whole, appeals to a prurient interest, and which further are utterly without redeeming social value would be obscene. . . .²⁴

The problem courts have to face is that they know obscenity when they see it, but they are unable to de-

fine obscenity so that others will know it when they see it.

The Texas obscenity statute appears to meet the second and third *Miller* tests, as the language used closely parallels the language in *Miller*. "Contemporary community standards" is the measure of what is patently offensive. This is in accordance with the recent United States Supreme Court holding in *Jenkins v. Georgia*.²⁵

The Texas requirement that the material be "utterly without redeeming social value" was expressly rejected in *Miller* as a burden impossible to discharge under criminal standards of proof. "Utterly without redeeming social value" is a much higher standard than the *Miller* test of "lacks . . . serious value."²⁶ Obviously the Texas Legislature can impose a higher burden of proof upon Texas than the burden required by *Miller* if it chooses to do so.

Assuming one can legally identify obscene material, the question of a state's right to regulate its use remains. No one has a First Amendment right to do business in obscenity—thus a state may regulate offering obscenity commercially, and Texas has done so in Section 43.23. On the other hand, one's right to possess obscenity is protected by the First Amendment.²⁷ Section 43.22 of the new Penal Code makes it an offense to intentionally or knowingly display or distribute obscene matter if he is "reckless about whether a person is present who will be offended or alarmed by the display or distribution." Seemingly, the legislature intended to reach the private citizen who owns obscene matter (legally) and decides (recklessly) to display it to his friends, one or more of whom are "offended or alarmed" as a consequence. Thus, Section 43.22 restricts the use a private possessor can make of his obscene material. Such a restriction seems reasonable enough. After all, the private owner is not prohibited by the statute from sharing his obscenity with his friends so long as he is sufficiently discreet about it.²⁸

Disorderly Conduct, Section 42.01 was discussed earlier under the heading of Conduct Conducive to Violence. However, it is necessary to discuss the Disorderly Conduct statute again under this heading of Conduct Inherently Offensive to the Sensibilities. The Disorderly Conduct statute outlaws use of "abusive, indecent, profane or vulgar language in a public place" or making an "offensive gesture or display in a public place," provided the language or gesture tends to incite an immediate breach of peace. Thus, the statute appears to comply with Supreme Court rulings that profane speech is protected by the First Amendment unless it amounts to "fighting words" or unless the profanity is sufficiently erotic to conjure up psychic stimulation.²⁹

Section 42.07, Harassment, also outlaws offensive speech. That Section deals with written or telephonic communication. Written or telephonic communication is criminal harassment if, *inter alia*, it is "vulgar, profane, obscene or indecent language or [communicated] in a coarse and offensive manner. . . ." But a state cannot legally criminalize language solely because it is vulgar or profane language. In *Rosenfield v. New Jersey*³⁰ the defendant had been convicted for using the phrase "mother-fucker" four times at a school

board meeting. His conviction was remanded by the Supreme Court. Similarly, in the case of *Lewis v. City of New Orleans*³¹ the defendant had been convicted for using the phrase "God damn mother-fucking police" and his conviction was remanded. In *Brown v. Oklahoma*³² the defendant had been convicted for referring to policemen as "mother-fucking fascist pig cops." His conviction was likewise remanded by the United States Supreme Court. The Harassment section of the Texas Penal Code appears to criminalize precisely what the United States Supreme Court says is protected by the First Amendment.

In addition to the obvious First Amendment difficulties, Section 42.07 looks like a textbook case of vagueness and overbreadth. Section 42.07 requires that the recipient of the communication be annoyed or alarmed. But the only manner in which the recipient's annoyance can be known is by the recipient's statement to that effect. Every person has his own unique scale of annoyance, and accurate determination of that scale is impossible to judge. Furthermore, the Harassment section is so broad that it includes callers who have every right and reason to intentionally and knowingly annoy or alarm the recipient of the call.

Section 42.09, Desecration of Venerated Objects, also criminalizes conduct that is offensive to the sensibilities. A public monument, a place of worship or burial, or a state or national flag is "desecrated" if it is physically mistreated "in any way that the actor knows will seriously offend. . . ." Note that no likelihood of breach of the peace is required, only the likelihood that the actor's treatment of the "venerated object" will "seriously offend." Consider the following hypothetical cases:

1. A group of militant black men rub charcoal on the face of the Confederate soldier monument which sits on the courthouse lawn.
2. A militant Chicano urinates on the wall of the Alamo.
3. A member of the Ku Klux Klan paints the letters "KKK" on the side of the LBJ Library.

Does this conduct "seriously offend"? Obviously, the answer—and the criminality—depends entirely upon the attitude of the person who views the conduct; a rather ephemeral criterion for making conduct criminal. Consequently, one might reasonably hypothesize that the Desecration of Venerated Objects statute is too vague and overbroad. First Amendment guarantees are

jeopardized by the wording of the Desecration statute. More often than not desecrating a venerated object will be motivated by a desire to communicate some feeling. After all, a venerated object is "venerated" precisely because it communicates something to the beholder; otherwise it would not be a venerated object. What more effective way to communicate a message than to employ a "venerated" object?

A state can outlaw certain forms of communication with objects.³³ For example, in *Van Slyke v. State*, the Court of Criminal Appeals sustained a conviction for the act of defacing a United States flag.³⁴ In *Jones v. Wade*, the Court of Appeals for the Fifth Circuit stated: "The State undoubtedly has a legitimate interest in preventing breaches of the peace which might follow certain acts of flag desecration."³⁵ But, can a state regulate the act of expressing thoughts with objects solely because the thoughts will "seriously offend one or more persons"?³⁶ Seemingly, the United States Supreme Court has answered that question in the very recent case of *Spence v. Washington*.³⁷ To protest the Kent State homicides, Spence placed a peace symbol on a United States flag, and hung the flag upside down out of his window. In reversing Spence's conviction, the Court said:

"It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." . . . Moreover, appellant did not impose his ideas upon a captive audience. Anyone who might have been offended could easily have avoided the display. . . . Nor may appellant be punished for failing to show proper respect for our national emblem.³⁸

Accordingly, the Desecration of Venerated Objects statute appears to be open to attack on the grounds that it is too vague and overbroad, and on the grounds that it infringes upon First Amendment liberties.

Conduct That Inconveniences the Public

Conduct that inconveniences the public can be used as a means of expressing thought, and thus may be protected by the First Amendment. Three sections of the new Penal Code have been selected for discussion under the rubric of Conduct That Inconveniences the Public. The three sections are: Section 42.03, Ob-
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structing Highway or Other Passageway; Section 42.05, Disrupting Meeting or Procession; and Section 38.13, Hindering Proceeding by Disorderly Conduct.

Obviously, the public is inconvenienced whenever a person or group of persons obstructs a highway or passageway of any sort while expressing their ideas. In *Cox v. Louisiana*³⁹ the Supreme Court acknowledged that freedom of expression is secondary to the interest of all citizens in promoting public convenience. Accordingly, Section 42.03 merely reflects the paramount interest of the general public when it outlaws the act of obstructing a passage. Nevertheless, freedom of expression and freedom of assembly by their very nature involve interfering with the place where the expression or assembly takes place. Accordingly, one can expect the courts to construe Section 42.03 narrowly so that it does not become a vehicle for complete denial of freedom of expression and assembly.⁴⁰

Section 42.03, Disrupting Meeting or Procession and Section 38.13, Hindering Proceedings by Disorderly Conduct, can be discussed together because they define substantially the same crime. These two statutes are designed to prevent conduct which disrupts a lawful meeting. Of course that purpose is laudable—indeed, it is a form of protection for the First Amendment rights of those gathered at the meeting. However, both sections are suspect because they are vague and overbroad. The operative language of Section 38.13 is "intentionally hinders . . . by noise or violence or tumultuous behavior or disturbance." The operative language of Section 42.05 is "obstructs or interferes . . . by physical action or verbal utterance." Officers enforcing those statutes are provided the opportunity to arrest people who are merely petitioning for redress of grievances. Some impairment of order at meetings (especially public meetings of governmental bodies) is simply the unavoidable price of maintaining a system of dynamic expression envisioned by the First Amendment. We must expect that meetings will be "hindered" by "tumultuous behavior" and some meetings will be "obstructed" by "verbal utterance." Individuals and groups proposing change are often driven to aggressive, even militant, conduct. That has been the history of all important social and political movements in this country, from the Boston Tea Party to the Black Revolution.⁴¹ Accordingly, it is difficult to imagine how the appellate courts can narrow these two sections of the Texas Penal Code sufficiently to save them from unconstitutionality.

Conclusion

Texas' new Penal Code contains a number of sections designed to outlaw and regulate conduct that comes within the realm of conduct protected by the First Amendment of the United States Constitution. Some sections of the Penal Code appear to contravene the First Amendment in every respect. Of course, those sections will not survive a constitutional challenge. The constitutionality of some of the other sections will depend upon how narrowly the courts are willing to construe them. Vagueness, overbreadth, and the rights of expression and assembly are inherent stumbling blocks for any draftsman of such legislation. The drafters of the Penal Code deserve credit for their efforts—if they failed in part it may be because certain types of con-

duct simply cannot be outlawed under the First Amendment, no matter how offensive and obnoxious that conduct might be. Perhaps, upon reflection, learning to tolerate some obnoxious conduct is a small price in return for an open society where all viewpoints may be expressed to all audiences.

AUTHOR'S NOTE: After this article was set for printing, the Texas Court of Criminal Appeals changed its opinion in *West v. State*. Therefore, the remarks about that case found on page 252 of this Journal are not entirely accurate. For details, see Onion, Opinion on Appellants' Motion for Rehearing, *West v. State*, 514 S.W. 2d 433, 441 (1974).

(The author gratefully acknowledges the research and editing assistance of Ms. Cathy Bayer, Law Student, University of Texas at Austin.)

1. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."
2. Emerson, *The System of Freedom of Expression* 364-65 (1970).
3. See Torke, *The Future of First Amendment Overbreadth*, 27 Vand. L. Rev. 289, 293 (1974): "Over broad statutes, which may in addition suffer from the vice of vagueness, are objectionable because their invalid dimensions may discourage persons from exercising first amendment rights, and because their invalid reach vests inordinate discretion in enforcement officials, juries, and judges."
4. *Gooding v. Wilson*, 405 U.S. 518, 521-522 (1972), quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942).
5. *Watts v. United States*, 394 U.S. 705 (1969).
6. *United States v. Rogers*, 488 F.2d 512, 514 n. 2 (5th Cir. 1974).
7. *Dailey v. State*, 436 S.W.2d 346, 349 (Tex. Crim. App. 1968).
8. See *Reynolds v. Sims*, 377 U.S. 533, 562 (1964): "[T]he right to elect legislators in a free and unimpaired fashion is a bedrock of our political system."
9. 315 U.S. 568, 574 (1942).
10. *Id.* at 572.
11. See *Gooding v. Wilson*, 405 U.S. 518, 523 (1972): "The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . ."
12. For a definitive discussion of this issue see McGaffey, *The Heckler's Veto: A Reexamination*, 57 Marq. L. Rev. 39 (1973).
13. In *Coates v. City of Cincinnati*, 402 U.S. 611 (1971), the United States Supreme Court held unconstitutional a Cincinnati ordinance making it a criminal offense for three or more persons to assemble on a sidewalk and "conduct themselves in a manner annoying to passersby."
14. *Gregory v. City of Chicago*, 394 U.S. 111 (1969).
15. 337 U.S. 1 (1949); cf. *Feiner v. New York*, 340 U.S. 315 (1951).
16. *Kois v. Wisconson*, 408 U.S. 229 (1972).
17. 413 U.S. 15 (1973).
18. *Id.* at 27-28.
19. *Id.* at 25.
20. Tex. Penal Code § 43.21(1) (1974).
21. 418 U.S. 153 (1974).

22. 514 S.W.2d 433 (Tex. Crim. App. 1974) rehearing denied.
23. *Id.* 441.
24. *Id.*
25. 418 U.S. 153, 157 (1974): "We agree with the Supreme Court of Georgia's implicit ruling that the Constitution does not require that juries be instructed in state obscenity cases to apply the standards of a hypothetical statewide community. . . . What *Miller* makes clear is that state juries need not be instructed to apply 'national standards.' We also agree with the Supreme Court of Georgia's implicit approval of the trial court's instructions directing jurors to apply 'community standards' without specifying what 'community.' . . . A State may choose to define an obscenity offense in terms of 'contemporary community standards' as defined in *Miller* without further specification, as was done here, or it may choose to define the standards in more precise geographic terms, as was done by California in *Miller*."
26. See *West v. State*, 514 S.W.2d 433, 440-441 (Tex. Crim. App. 1974) rehearing denied: "In spite of the holding in *Miller*, supra, that a depiction or description of prurient, patently offensive sexual conduct that lacks serious literary, artistic, political, or scientific value does not merit First Amendment protection, the statutory definition of obscene material only includes such descriptions or representations as are utterly without redeeming social value. Thus such material as lacks serious literary, artistic, political or scientific value, but yet is not utterly without redeeming social value, though constitutionally obscene, is not statutorily obscene under Article 527, supra."
27. *Stanley v. Georgia*, 394 U.S. 557 (1969).
28. See *Stein v. Batchelor*, 300 F.Supp. 602 (N.D. Tex. 1969), holding a statute unconstitutional for failure to confine its application to public or commercial

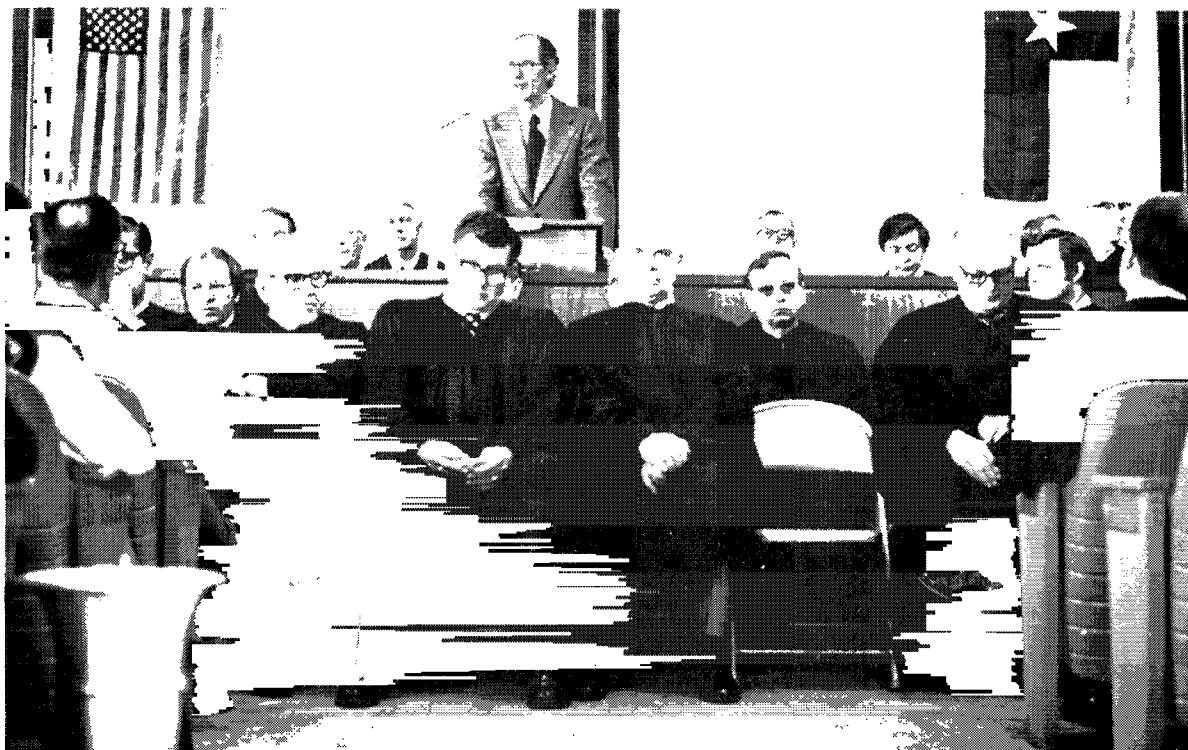
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29. *Cohen v. California*, 403 U.S. 15 (1971); *Lewis v. City of New Orleans*, 415 U.S. 130 (1974).
30. 408 U.S. 901 (1972).
31. 415 U.S. 130 (1974).
32. 408 U.S. 914 (1972).
33. *United States v. O'Brien*, 391 U.S. 367 (1968).
34. 489 S.W.2d 590 (1973), appeal dismissed, 94 S. Ct. 3198 (1974).
35. 479 F.2d 1176, 1179 (5th Cir. 1973).
36. Tex. Penal Code § 42.09(b) (1973).
37. 418 U.S. 405 (1974).
38. *Id.* at 412, quoting *Street v. New York*, 394 U.S. 576, 592.
39. 379 U.S. 536 (1965).
40. See generally *Hague v. C. I. O.*, 307 U.S. 496, 515-516 (1939).
41. See generally Emerson, *The System of Freedom of Expression* (1970). ■

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